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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

J.S.G. BOGGS,
Petitioner,
v.
ROBERT E. RUBIN, BRIAN L. STAFFORD, and JANET RENO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The First Amendment requires that any prior restraint of expression take place under procedural safeguards that protect against the dangers of a censorship system, including a uniformly imposed requirement that the government bear the burden of obtaining prompt judicial review Do these safeguards apply to expressive materials regardless of their subject matter, or are they limited to alleged obscenity, as the Court of Appeals held?

2. May a District Court declare expressive material to be forfeited to the government as "contraband" where the forfeited property was either not shown to the court at all or was shown to the court *ex parte*?

3. Where works of fine art forfeited as "contraband" are not in the District Court record, and the Court of Appeals denies the owner's motion to supplement the record before it to include these materials, has the Court of Appeals fulfilled its duty, present in First Amendment cases, to "make an independent examination of the whole record" (*New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964))?

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J.S.G. Boggs, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The majority and dissenting opinions of the Court of Appeals (App. 1a) are reported at 161 F.3d 37. The opinion of the District Court (App. 17a) is reported at 987 F. Supp. 1.

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[1] This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.6.

JURISDICTION

The Court of Appeals entered judgment on November 6, 1998 and denied a timely filed petition for rehearing on February 3, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First and Fifth Amendments, and of 18 U.S.C. §§ 474 and 504, are reproduced in the appendix.

STATEMENT

Petitioner, J.S.G. Boggs, is an internationally respected artist. His work graces the permanent collections of the Smithsonian Institution, the Museum of Modern Art, the British Museum, and the Art Institute of Chicago. He received formal training in fine arts at Columbia University; lectured at Brown University; served as a Fellow in Art and Ethics at Carnegie Mellon University; and published scholarly work.

Boggs has been known to use actual-sized interpretations of money in his work. This case arises out of enforcement efforts by the United States Secret Service under color of 18 U.S.C. § 474 directed against certain of Petitioner's works of art. As the case comes to this Court (on summary judgment for the government), the record evidence is that the works of art are not counterfeit money. The works of art at issue are not themselves in the record—improperly, for reasons described below. But affidavits in the record from an Ivy League art professor, a museum curator, a distinguished art historian, and a commercial printer uniformly support Boggs' position that the art is readily distinguishable from money. The lower courts in this case declared the works of art contraband and forfeited to the United States under the

counterfeiting statutes. The District Court did so *ex parte* and the Court of Appeals affirmed without examining even one of them, whether an original or a reproduction —a review "*sine scrutatione*."

It is undisputed that Boggs has never defrauded anyone into believing that his works are really currency. The Distict Court in this case held that "no one seriously suggests [and no jury could find] that Mr. Boggs has any intent to defraud." *Boggs v. Bowron*, 842 F. Supp. at 557. The District Court also noted that Boggs "alters some of the design elements from genuine bills, such as replacing the signature of the Secretary of the Treasury with his own, changing the portrait on the front, or creating a denomination that does not exist. Boggs travels the country bartering his work for goods and services by explaining to merchants that he is an artist." App. 17a.

The Secret Service has repeatedly challenged Boggs' position—apparently on some sort of principle, for no person has ever complained to any law-enforcement authority about being defrauded by Boggs or by anyone else using his art. Apparently, the governmental interest is in "preserving the integrity" of a "property" interest in the "design and appearance" of currency. *See* Brief for Appellants in *Regan v. Time, Inc.*, 468 U.S. 641 (1984) at 14. One Treasury spokesman has publicly condemned artistic activities that would "defame the intrinsic value" of currency, adding: "[a]fter all, this is the currency of the United States of America, and that stands for something." Calvin Sims, "In Recycling of Greenbacks, New Meaning for Old Money," *New York Times*, May 22, 1994 at 1, 26.

The Secret Service's efforts to obtain prosecution of Boggs have failed. Three successive United States At-

torneys in three separate Districts have all declined prosecution.

By the time of the events in question in this case, the Secret Service knew about Boggs and his status as an artist. In 1990, Secret Service agents in Tampa concluded that Boggs lacked any criminal intent, and on their recommendation the United States Attorney for the Middle District of Florida declined prosecution.

The Warrantless Seizure. In March 1991, a Secret Service agent in Cheyenne, Wyoming "confiscated" fifteen works of art from Boggs. The agent had no warrant. Despite repeated demands, the Secret Service has refused to return the fifteen works or seek an adversarial judicial hearing approving the seizure. Like his counterpart in Florida, the United States Attorney for the District of Wyoming declined prosecution.

In September 1992, Boggs was on the faculty of Carnegie Mellon University in Pittsburgh, Pennsylvania. A Secret Service agent in Pittsburgh read a newspaper article about Boggs and opened a new investigation. The agent interviewed Boggs, read a report that the Cheyenne agent had written, looked at the fifteen works of art seized in Cheyenne, and submitted the materials he had gathered to the United States Attorney's Office for the Western District of Pennsylvania. On November 4, 1992, that office advised the Secret Service that "there is not enough at this time to merit prosecution of Boggs." Court of Appeals Joint Appendix ("J.A.") 234.

There matters stood on November 30, 1992, when an Assistant United States Attorney read another newspaper article about Boggs and an anticipated performance-art event called "Project Pittsburgh," in which the public itself would barter with Boggs' art over the coming year with the cooperation of a number of local merchants. Public

barter of locally or privately issued "script" is common in the United States. *See, e.g.*, Edward A. Gargan, "Giving Money Local Color," *New York Times*, May 28, 1998 at B1, B8. The newspaper reported that the Project would commence with a public performance by Boggs on December 2.

The Prior Restraint. The day that the newspaper report came out, according to internal Secret Service documents, "there was a major discussion of this case" attended by the United States Attorney, four Assistant United States Attorneys, and two representatives of the Secret Service's Pittsburgh field office, including the Special Agent in Charge. J.A. 234. The Secret Service had developed no new evidence of potentially criminal activity —only the newspaper article was new—so the government still had no basis to proceed with prosecution. Nonetheless, the government agents decided to use their criminal investigation powers to effect a prior restraint on Boggs. According to a Secret Service internal report, the "U.S. Attorney stated that we cannot allow this man to pass out $1 million in Boggs bills in the Pittsburgh area." J.A. 234. Later that day, the Secret Service and the AUSA "agreed that search warrants should be applied for and executed so as to keep Boggs from passing these bills." J.A. 235.

Four Secret Service agents executed warrants on December 2 at Boggs' home, studio, and office at Carnegie Mellon University. These agents seized any and all images of money, including framed works of art (some based on foreign currency including Swiss and British currency), a "sketch" of a twenty-dollar bill, a "duplicate of a million dollar note," air fresheners, a sponge, a calculator, a bow tie, match books, a whistle, and a video tape of a BBC documentary film featuring Boggs. In all, the agents seized more than 1300 items, including hundreds of works of art.

These actions were flatly contrary to this Court's fundamental tenet that except in extraordinary circumstances —and even then, only with adequate procedural safeguards—prior restraints on speech may not be used to prevent potential criminal acts:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975); *accord Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980).

There was no question that these government agents knew that the "Project Pittsburgh/Boggs Bills" they intended to seize were art—and no question that only three weeks earlier the United States Attorney had concluded that the facts provided no basis for prosecution. Their acts that day were—pure and simple—a prior restraint on speech.

The Government's Unilateral Confiscation of the Property. After the mass seizure—which ironically did not include seizure of the "Project Pittsburgh/Boggs Bills"—government activity with respect to Boggs halted. In 1995, the United States Attorney in Pittsburgh formally declined prosecution—the third formal declination of prosecution of Boggs from the three United States Attorneys who had considered the matter. Shortly after this, Boggs' counsel wrote to the government demanding return of Boggs' property: "should the [government] decide not to seek civil forfeiture—a determination that has been unduly delayed—we expect all of our client's property

to be returned promptly." J.A. 166. The government responded: "We will not file a civil forfeiture action, but will merely keep the contraband." J.A. 167.

Proceedings in the District Court.[2] Boggs commenced an action in the United States District Court for the District of Columbia seeking (*inter alia*) return of the property and demanding a jury trial.[3] Boggs moved for summary judment, arguing that the warrantless seizure in Cheyenne and the lack of any adversary hearing were clear violations of the First Amendment's prohibition on prior restraint without adequate procedural safeguards, and that the universal remedy for the improper seizure of property presumptively protected by the First Amendment is the return of the material.

The government did not deny any of the factual allegations supporting Boggs' motion. The government also conceded that—in general—warrantless seizures and failure to seek a post-seizure adversarial hearing violate the First Amendment and that an appropriate remedy for such a violation is return of the seized property. Yet the government argued that the bills were contraband *per se* so that the First Amendment simply did not apply.

Boggs opposed the government's attempt to secure a forfeiture without proving to a jury that the art in question actually violated the counterfeiting laws. Boggs also moved for a hearing. In response, the government made

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[2] We are sorry to say that the proceedings in the lower courts involved conduct that the Court will find extraordinary. We must therefore ask the Court's indulgence to present a lengthier description of these proceedings than would normally be expected in a petition for certiorari.

[3] Boggs also sought a preliminary injunction against prosecution, which the courts below denied. *Boggs v. Bowron*, 842 F. Supp. 542 (D.D.C. 1993), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996).

some sort of *ex parte, in camera* submission to the District Court, to which Boggs was not privy. The record contains none of the works submitted *in camera* to the District Court or even copies of them.

The District Court made no transcript of the *in camera* inspection. There is no record of exactly what items the District Court reviewed. There is no record of how long any particular item was studied. And there is no record of whether the government presented any *ex parte* argument, although on appeal the government lawyers who replaced the AUSA responsible for the *ex parte* submission denied that the *ex parte* submission included argument.[4]

The District Court did not invite Boggs to attend the *in camera* proceeding, personally or through counsel. The government provided Boggs no advance notice of its submission nor any specific description of which works of art it put before the District Court. He had no opportunity to present argument or witnesses. He had no opportunity to place the alleged "contraband" in the context of the other art that had been seized but which the government was not contending was contraband. He had no opportunity to present arguments by counsel pointing to various facts in the record tending to rebut the government's assertion that the pieces of art held to be "contraband" were in fact contraband, including sworn statements not only from plaintiff, but from four witnesses—an expert on American painting, the Chairman of Brown University's Department of Visual Art, the curator of the Andy Warhol Museum, and a printer with a lifetime of relevant industry experience. He had no opportunity even to present

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[4] The AUSA responsible for the case died between the *ex parte* submission and the Court of Appeals argument. He does not appear to have left any record of his conduct of the *ex parte* submission.

argument directed to the look and feel of the individual pieces of art put before the District Court, not knowing which they were out of the several hundred that had been seized.

The District Court's Decision. Four business days after the government mailed out a notice of this closed-door session, the District Court granted summary judgment for the government and dismissed the complaint.[5] It did so without addressing the items that the government conceded were not contraband (App. 32a n.4)—and thus should have been ordered returned—and without addressing with specificity any of the items it held to be contraband.

The District Court acknowledged that Boggs' work is protected by the First Amendment (App. 23a n.2) and that "Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of property is return of the material." App. 30a. The Court added that "the length of time that has elapsed between the seizures and the government's final decision not to prosecute—almost two years—mitigates [*sic*] in favor of plaintiff's claim for the return of his goods." App. 30a-31a. And the Court observed that each work of art is "unique such that individual determinations" of their legality must be made. App. 34a.

However, the District Court held that the procedural safeguards set forth by this Court in a line of cases including *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989), apply only in obscenity cases, and therefore were not triggered by the warrantless seizure in Cheyenne or the mass seizures in Pittsburgh. The District Court did not attempt

[5] The record does not indicate whether the *ex parte* session took place *before* or *after* the government mailed its notice.

to rationalize its inverted First Amendment hierarchy—in which artistic and political speech receives no immunity from a prior restraint effected with or without a search warrant, but obscene speech (which ordinarily falls completely outside the ambit of First Amendment protection) *is* so protected.

Having rejected Petitioner's application of First Amendment doctrine, the District Court then went on to rule that the art it had seen *ex parte* and *in camera* was contraband. The District Court explained that it had "accepted" the government's "invitation" to "rule on the basis of its own observations," "conducted an *in camera* [and *ex parte*] review of all of the Pittsburgh materials," and decided that "all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency" and therefore "are contraband." App. 34a-35a. Approximately 80 of the more than 1300 seized items apparently fell into this category. *Id.* Which they are, Petitioner knows not.

The District Court did not view all 1300 items that the Secret Service had seized. Exactly how many items the government put before it to view—and what they looked like—cannot be ascertained from the record. The Court's opinion states only that it "examined all of the *disputed* Boggs Bills seized in *Pittsburgh*." App. 34a (emphasis supplied). None of the seized items—contraband or not—ever found their way into the record where they could be examined by the public or by the reviewing courts. They remain locked in the vault of the Secret Service, where they have been since they were seized in 1991 and 1992. Boggs was not offered an opportunity to visit them before, during, or after the *in camera* submission. He has not seen them for many years.

The Court of Appeals' Decision. A divided panel of the United States Court of Appeals for the District of

Columbia Circuit affirmed. The panel agreed unanimously that the First Amendment applied here and that "[t]he Supreme Court has indeed held law enforcement officers to a higher standard when presumptively expressive materials are involved because of the risk of prior restraint and censorship." App. 6a. But, following the District Court, it held that "[t]he important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here." App. 7a. The panel reasoned that procedural safeguards are necessary in obscenity cases because such cases require "significant judgment," even while conceding that the statute here requires the exercise of "some judgment." *Id.* The panel did not otherwise discuss the many decisions of this Court holding—in a wide variety of contexts—that *any* system of prior restraint requires adequate procedural safeguards including specific and brief time limits and a prompt adversarial hearing in which the government bears the burden of going to court and the burden of proof once in court.

Astoundingly, in affirming the judgment, the panel majority refused to look at the art in question and considered the *ex parte* nature of the proceedings in the District Court "insignificant." App. 8a. The majority argued that Boggs was "free to request access to the materials" submitted *ex parte* by the government (without acknowledging that the District Court entered judgment only four business days after the government mailed its "notice of *in camera* submission"). *Id.* No basis exists in the Federal Rules of Civil Procedure for this interesting procedure: *ex parte* submission, notice thereof by mail, and then a race to the courthouse with a "request for access." The majority begrudgingly admitted that its holding could not be squared with cases forbidding *ex parte* evidence in civil actions, arguing that "if there was error, we hold that it was insignificant and Boggs could have avoided

any ill effect by proper motion below" (presumably in the two days between receipt of the notice of *ex parte* submission and entry of the judgment). App. 8a. In her dissenting opinion, Judge Rogers observed that it is "impossible to characterize *ex parte* receipt of unknown materials not in the record as 'insignificant.'" App. 15a n.7.

Boggs moved in writing for supplementation of the record. Denying his written motion to supplement the record and ignoring the substantive thrust of his brief—that review was impossible absent a complete record—the panel majority simply refused to look at the core, operative evidence—the "contraband" art—on the theory that appellant had waived the right to review on a complete record. App. 8a, 10a.[6]

Judge Rogers dissented on this issue. She wrote:

> Given that this case involves government regulation —indeed, confiscation—of expressive materials, and that art may at times imitate reality, this court is obliged on *de novo* review of the grant of summary judgment to look at the Boggs bills to determine if they meet the statutory criteria for counterfeit currency.
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> Without viewing the bills, this court cannot determine for itself whether the district court correctly applied

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[6] Boggs' principal argument on appeal (Point I in his Brief) was that the District Court's acceptance of *ex parte* evidence and failure to make a record required a remand at minimum. Boggs expressly relied on *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), and *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The government opposed a remand and argued in footnotes (a) that the Court of Appeals should look at the works of art itself even though they were not in the record, and (b) that appellant should have moved for an order instructing the government to supplement the record even though the government did not so move.

> the law, or even if it applied the correct law. It is not sufficient to rely, as the [majority] does, on the district court's recitation of the correct statutory standards. Elsewhere in its opinion, the district court described 18 U.S.C. § 474 as essentially objective, yet it appears to incorporate a substantial degree of subjectivity. In addition, the district court's findings that a sponge and bow tie are in the "similitude" of actual currency raises questions about its statutory interpretation that warrant scrutiny on appeal.

App. 12a-13a (footnotes omitted).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ERODES FIRST AMENDMENT SAFEGUARDS AGAINST PRIOR RESTRAINTS

This Court has consistently held that any system of prior restraint must meet certain fundamental procedural safeguards, including a requirement that the restraint be subject to prompt and meaningful judicial review. Generally, the burden of going to court and the burden of proof in court must also rest with the government.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court struck down a motion picture censorship statute that failed to provide adequate procedural safeguards. Building on earlier precedent,[7] the Court ruled unanimously that a motion picture censorship system was unconstitutional because it did not (1) contain a specified, brief period for the restraint, (2) provide expeditious judicial review, and (3) impose on the government the burden

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[7] *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). These cases held that expressive materials may not be seized in anticipation of a criminal prosecution without a prompt adversarial hearing, and that the remedy for violation of this requirement is return of the seized materials.

of going to court to suppress the speech and bear the burden of proof once in court. The statute under review in *Freedman* applied to all motion pictures (other than newsreels), and the state conceded that the film at issue would have qualified for a license had the exhibitor applied for one.

Ten years later, this Court recognized *Freedman* as stating "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). In *Southeastern Promotions*, the Court held unconstitutional a municipality's refusal to license a production of the musical "Hair," because the denial of the license had been unaccompanied by adequate procedural safeguards. The Court ruled against the government *not* as an effort to protect obscenity, but because "[i]nsistence on rigorous procedural safeguards under these circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.*, 420 U.S. at 561 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court struck down a content-neutral licensing system as failing to provide adequate procedural protections. The Court observed that "[t]he core policy underlying *Freedman*" requires (1) that the restraint not exceed a specified and reasonable time period, and (2) that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.*, 493 U.S. at 228.

From the perspective of two and a half decades, *Freedman*'s author observed: "We have never suggested that our

insistence on *Freedman* procedures might vary with the particular facts of the prior restraint before us. To the contrary, this Court has continued to require *Freedman* procedures in a wide variety of contexts." *FW/PBS*, 493 U.S. at 239 (Brennan, J., concurring).

And in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the Court again struck down a prior restraint that was not the product of adequate safeguards—this time, a pretrial seizure of books alleged to be the fruits of a racketeering enterprise. Writing for a Court that was unanimous on this issue, Justice White explained that "this Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.'" *Id.*, 489 U.S. at 62. Of course, the basis for the decision was not that obscenity requires some sort of heightened protection. It does not. Instead, this Court explained, "[i]t is the risk of prior restraint . . . that motivates this rule." *Id.*, 489 U.S. at 63-64 (internal quotations and citation omitted).

To be sure, as the Court of Appeals in this case observed, the rule of *Freedman* has been applied frequently to prior restraints on speech of a sexually explicit nature. But—at least until now—such requirements have also applied without exception to a wide variety of speech on subjects of every other kind and character, including public assembly and parades by groups of every political persuasion,[8] traditional news reporting,[9] charitable fund rais-

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[8] *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*) ("[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards"); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969); *Carroll v. President & Commrs. of Princess Anne County*, 393 U.S. 175, 180 (1968); *see Hague v. CIO*, 307 U.S. 496 (1939).

[9] *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319 (1975) (Blackmun, J., in chambers).

ing,[10] and—as in *Freedman* and *Southeastern Promotions* —popular entertainment.

The Court of Appeals' opinion in this case substantially erodes these well-established First Amendment protections against prior restraints—unless the expression at issue happens to be obscene. So far as we know, the D.C. Circuit opinion in this case is the first time a court has provided obscenity *more and better* protection than other speech—in this case, works of art made by a classically trained artist.

Certainly nothing in this Court's jurisprudence suggests that the danger to be avoided with procedural safeguards is limited to speech of a sexual nature—let alone obscenity, which ordinarily enjoys no First Amendment protection at all. *See United States v. Thirty Seven Photographs*, 402 U.S. 363, 376 (1971).

The Court of Appeals recognized that this Court crafted the First Amendment requirements of a warrant and a prompt adversary hearing—which admittedly were not met in this case—"because of the risk of prior restraint and censorship." App. 6a. That is true. This Court has repeatedly explained that the warrant and hearing requirements serve as a procedural bulwark against prior restraints. *See Fort Wayne Books*, 489 U.S. at 63 ("It is 'the risk of prior restraint' . . . that motivates" the rule that requires an adversary hearing) (internal quotation omitted); *accord Bantam Books*, 372 U.S. at 66; *Marcus*, 367 U.S. at 724-29 (describing history of prior restraint at common law and concluding that the framers fashioned the First Amendment to prevent "the suppression of innocent expression" that "inhered in the discretion confided in the officers to exercise the power" of prior restraint).

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[10] *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988); *see Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Moreover, this Court has explained that the need to prevent prior restraints "is obviously true for books or any other expressive materials." *Fort Wayne Books*, 489 U.S. at 63.

Yet the Court of Appeals attempted to distinguish this Court's precedents on the theory—never expressed in the cases—that "significant judgment" is needed to determine if the seized materials are contraband in obscenity cases, while saying that only "some judgment" is needed in this case. App. 7a. The Court cited no case in support of this theory and suggested no means to distinguish between subject matters like obscenity—which the Court of Appeals said required "significant judgment"—and other subjects—which the Court said required only "some judgment" and accordingly can be forfeited through *ex parte* proceedings. We note that in the "judgment" of the Secret Service, a sponge and a bow tie with images of money on them are "counterfeit" under 18 U.S.C. § 474, a statute that requires the government to prove that the items bear "such a likeness or a resemblance to a genuine obligation . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright." [11] As Judge Rogers pointed out in her dissenting opinion, the standard "appears to incorporate a substantial degree of subjectivity." App. 13a.

To be sure, the Court of Appeals may have been led astray because many cases expressing the *Freedman* requirements arose out of seizures of sexually explicit ex-

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[11] *United States v. Hall*, 801 F.2d 356, 357-58 (8th Cir. 1986) (reviewing cases dating back more than a century and concluding "[t]he similitude jury charge has received general acceptance in § 474 prosecutions"); *United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970); *see* 2 Edward J. Devitt, *et al.*, *Federal Jury Practice & Instructions*, § 29.12 (4th ed. 1990).

pression. But this Court has repeatedly applied the *Freedman* requirements to a wide variety of subject matters, including business, politics, and popular culture. *See supra* pp. 13-16 & nn.8-10. The Court has never suggested (as the Court of Appeals held) that sex should receive more and better protection than other forms of discourse. Indeed, just the opposite is true:

> In the present case [involving "political and social expression"], the reasons for insisting upon an opportunity for hearing and notice . . . are even more compelling than in cases involving allegedly obscene books. . . . "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. . . . On the other hand, the subject of sex is of constant but rarely particularly topical interest."

Carroll, 393 U.S. at 182 (quoting *A Quantity of Copies of Books*, 378 U.S. at 224 (Harlan, J., dissenting)); *accord Shuttlesworth v. Birmingham*, 394 U.S. at 162 (Harlan, J., concurring).

The panel concluded its analytical justification for permitting this prior restraint by stating that "the inquiry [in this case] is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials." App. 7a. But the panel's assertion that the prior restraint here was inoffensive because it was supposedly content-neutral is simply not a correct statement of law. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70).

This Court has held repeatedly that even a content-neutral prior restraint is unconstitutional if not accompanied by adequate procedural safeguards—safeguards that

the panel acknowledged were lacking here. *See FW/PBS v. City of Dallas*, 493 U.S. at 223 (striking down statute without reaching whether it was content neutral); *Southeastern Promotions*, 420 U.S. at 562 (procedural shortcomings were "unrelated to the standard that the board applied"); *Shuttlesworth*, 394 U.S. at 155 n.4 (content-neutral time, place, and manner regulation must provide for "expeditious judicial review").

Without review in this Court, other courts will be tempted to follow the trail blazed by the D.C. Circuit, permitting prior restraints on speech where, as here, judges conclude that merely "some judgment" is required of the censor, rather than "significant judgment." It is no defense of a system of censorship that it can be implemented by censors of marginal ability rather than by Platonic Guardians. Until now, the courts' prohibition on prior restraints has not been dependent on the quantum of "judgment" the censor must exercise, but rather rested on the tenet that such judgment must not be exercised at all without adequate procedural oversight. Thus, the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have all applied the doctrine requiring procedural safeguards to a variety of cases that do not involve sex.[12] The D.C. Circuit stands alone in limiting the rule as it has.

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[12] *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 227-28 (2d Cir. 1998) (applying rule of *Freedman* to commercial speech); *New York Magazine v. Metropolitan Trans. Auth.*, 136 F.3d 123, 131-32 (2d Cir. 1993) (same); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232-33 (4th Cir. 1989) (same); *Quarterman v. Byrd*, 453 F.2d 54, 60 (4th Cir. 1971) (distribution of printed material requiring approval of high-school principal); *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. 1981) (ordinance governing literature distribution and fundraising at airports); *Walker v. Wegner*, 624 F.2d 60, 62 (8th Cir. 1980) (charitable solicitation); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 675-76 (11th Cir. 1984) (newsrack licensing ordinance).

Such a holding would be troubling in any context. It is particularly troubling here, because the statute at issue, 18 U.S.C. § 474, was said by the lower courts to criminalize the possession of any image that looks sort of like money—even a novelty item like a sponge or a bow tie with a picture of money on it. Violation of the statute carries a maximum prison term of 25 years—even more severe than the fifteen-year penalty for actual counterfeiting. 18 U.S.C. §§ 471, 472, 474, 3581(b)(2). This, to protect the government's "property interest" in the "integrity" of the "design and appearance" of currency. *See supra* p. 3.

As interpreted below, the statute covers a wide variety of speech that bears no risk of promoting counterfeiting or fraud. Dozens of publishers and advertisers every year print millions of copies of the image of United States currency, all "violations" of the statute as interpreted below—that is, pictures including images of money. The image of currency is commonplace. It is on the covers and pages of popular magazines, billboards, coupons, and clothing. The record in this case includes a survey showing that dozens of popular magazines published more than 85 million copies of felony "violations" of the statute as interpreted below in a single, six-month period. Thus the courts have not only authorized governmental self help, but have "criminaliz[ed] a broad range of apparently innocent conduct," *Liparota v. United States*, 471 U.S. 419, 426 (1985), in a way that interferes with "settled expectations that the contents of magazines and films are generally [not] subject to stringent public regulation." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994).

II. THE DISTRICT COURT'S *EX PARTE* FORFEITURE OF PROPERTY WARRANTS REVIEW

The panel opinion establishes an interesting and dangerous precedent by which the government may effect

forfeiture unilaterally. Henceforth, the government may unilaterally seize anything it thinks is contraband and then "merely keep" it. No further action need be taken until the owner files a lawsuit, at which time the government may cherry-pick samples of the "contraband," bring them to the district judge for an *ex parte, in camera* examination, and the district judge can then give the seizure a judicial *imprimatur*.

Forfeiture actions are not supposed to work that way. Due process requires notice and an opportunity to be heard before any forfeiture. *Degen v. United States*, 517 U.S. 820, 822 (1996); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). Due process does not permit the government to "merely keep" what it alone has determined is "contraband." Nor does it permit forfeitures to be decided on the basis of *ex parte* submissions of the government without the opportunity of the owner to be heard, to offer testimony and other evidence, and to cross-examine the government's witnesses. According to the Court of Appeals' opinion, though, due process requires the owner to make an urgent "request for access" (on two days' notice) or forever waive his right to the ordinary adversarial process.[13]

In *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972), this Court reversed dismissal of a property owner's action for return of property on the ground that the owner did not receive actual notice of the forfeiture hearing. Here, there was not even a hearing. More recently, in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-49 (1993), this Court held it is impermissible even for the government to seize property *ex parte* in anticipation of a *later* public forfeiture hearing. In that case, the gov-

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[13] The notice did not say that access would be granted—it was simply notice of a *fait accompli*.

ernment seized property owned by an individual convicted of a narcotics offense. Under the forfeiture statutes involved in that case, property purchased with the proceeds of narcotics would be forfeited to the government. Despite the almost automatic nature of the forfeiture, this Court held that the *ex parte* seizure and retention of Good's property was a violation of the Fifth Amendment, under the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *Id.* at 48.

Before joining this Court, Justice Ginsburg explained why judgments are not supposed to be made on the basis of *ex parte* submissions:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceeding serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.

Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987); *accord Association for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) (" 'Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation.' ") (*quoting Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)). This principle arises out of basic notions of fairness—exceptions to the rule are therefore rare. *Abourezk*, 785 F.2d at 1061.

As this Court explained, in another case invalidating a prior restraint on speech:

> The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the

> process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.

Carroll, 393 U.S. at 183.

The panel majority attempted to excuse the District Court's radical departure from accepted judicial conduct by blaming the victim, who was supposedly "free to request access to the materials" between his receipt of the "notice of *in camera* submission" and the entry of judgment two days later. The majority suggested that Boggs was at fault because he did not make a "timely objection to the submission below" in those two days. App. 8a. "If there was error," the majority asserted without further discussion, "we hold that it was insignificant and Boggs could have avoided any ill effect by proper motion below." *Id.* Boggs did not initiate the *ex parte, in camera* proceedings; the government did. The Court of Appeals majority dreamed up a remedy called a "request for access to items seen by the court but not in the record"—a procedure that is a stranger to the Federal Rules of Civil Procedure. Judge Rogers noted that "it is impossible to characterize *ex parte* receipt of unknown materials not in the record as 'insignificant.' " App. 15a n.7.

Forfeiture on contested fact issues should not be decided on the basis of *ex parte* review of the evidence. Boggs presented affidavits from distinguished witnesses that his art did not meet the standard required for a violation of the statute in question. Boggs would have been entitled to a jury in a civil forfeiture case. *See United States v. J.B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974) (Friendly, J.) (collecting numerous cases). He should not have been compelled—through government intransigence—to put his fate in the hands of a single individual making unexplained determinations outside the

record, outside public scrutiny, and outside effective appellate supervision.

III. THE COURT OF APPEALS' REFUSAL TO LOOK AT THE CORE EVIDENCE PRESENTS A RADICAL DEPARTURE FROM ACCEPTED JUDICIAL BEHAVIOR AND IS OUT OF STEP WITH THE RULE IN OTHER CIRCUITS

On appeal from an order granting summary judgment, a reviewing court is supposed to examine the record *de novo,* drawing all reasonable inferences in favor of the appellant. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466 n.10 (1993); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (*per curiam*). Furthermore, in cases that implicate First Amendment issues, "an appellate court has an obligation to make an independent examination of the whole record." *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964).

Yet the panel majority in this case actually refused a written request that it review the core, operative evidence —which was, bizarrely, not in the record! We have found no other such case in any context—let alone in a contested forfeiture action over expressive material admittedly entitled to First Amendment protection.

The panel divided on this issue. The majority contended that Boggs waived his right to review on a full record. That contention was a transparently *ex ante* rationalization: Boggs complained, in Point I of his brief to the Court of Appeals, that review was impossible based on the absence from the record of the core evidence and expressly requested a remand to the District Court. Remand to supplement the record is not a novelty. It is the way other courts of appeals deal with insufficient records. For example, in *United States v. Wilson,* 116 F.3d 1066, 1081 (5th Cir. 1997), the record did not reflect the Dis-

trict Court's disposition of an *in camera* review of potential *Brady* material. The Fifth Circuit remanded for supplementation of the record, under seal if necessary. Remand—rather than the D.C. Circuit's novel "waiver" theory—has also been the rule in the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.[14] So far as our research has revealed, no other court of appeals has ever before refused a request for supplementation on a theory that the party seeking to supplement the record waived its right to do so.

Yet in this case, the majority below refused even to look at the art. The majority appears to have punished a litigant under a theory of "waiver" for complaining to the Court of Appeals rather than the District Court about his adversary's *ex parte* submission *dehors* the record, holding that he should have raced to the District Court with a "request for access" in the two days before that Court entered judgment.

This was an abdication of the Court of Appeals' role. An appeal should be decided on the record—the *real* record, not what the District Court chose to put in it. "Review of decisions based upon *in camera* examinations is difficult in the best of circumstances," *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 589 (D.C. Cir. 1987), and is impossible where, as here, the *in camera*

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[14] *United States v. Miranda-Santiago*, 96 F.3d 517, 519 (1st Cir. 1996); *United States v. Jiang*, 140 F.3d 124, 129 (2d Cir. 1998); *Salinger v. Random House*, 818 F.2d 252 (2d Cir. 1987); *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998); *Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988); *Sarnoff v. American Home Prods.*, 798 F.2d 1075, 1079 (7th Cir. 1986); *Sierra Club v. United States Army Corps. of Eng'rs*, 771 F.2d 409, 413 (8th Cir. 1985); *United States v. Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982); *United States v. Preciado-Cordobas*, 923 F.2d 159 (11th Cir. 1991); *Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986) (*en banc*).

evidence never makes it into the record. It is therefore an axiom of appellate practice that, "if the record lacks sufficient information to indicate the factual basis for the trial court's finding, then no review is possible since the circuit court cannot determine if the finding was erroneous." 19 J. Wm. Moore, *Moore's Fed. Practice* ¶ 206.03[6] at 206-20 (3d ed. 1998). By refusing to supplement the record, the D.C. Circuit put itself out of step with other circuits, which have uniformly followed this practice.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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